

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROLANDO DIAZ</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>UNITED PARCEL SERVICE</b>	)	
Respondent	)	Docket Nos. 1,021,750
	)	1,022,407
	)	
AND	)	
	)	
<b>LIBERTY MUTUAL FIRE INS. CO.</b>	)	
<b>LIBERTY MUTUAL INS.</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and its insurance carriers request review of the January 4, 2006 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

**ISSUES**

Following a preliminary hearing and pursuant to the parties' agreement, the Administrative Law Judge (ALJ) designated Dr. Moufarrij to serve as the authorized treating physician in the above referenced claims. Dr. Moufarrij is apparently supposed to provide diagnosis and treatment for claimant's ongoing neck complaints. The ALJ also ordered respondent to resume paying temporary total disability benefits (TTD) beginning August 25, 2005, the date respondent unilaterally stopped making such payments. Finally, the ALJ directed the claimant to cooperate with the treating physician or his TTD would be terminated.<sup>1</sup>

The respondent requests review of this decision alleging claimant failed to establish that his alleged neck injury arose out of and in the course of his employment.

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<sup>1</sup> ALJ Order (Jan. 4, 2006).

Claimant contends the ALJ's preliminary order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

This is one of many appearances for one or both of these claims before the Board.<sup>2</sup> In each instance, the Board has summarized the evidence in some detail and rather than unnecessarily repeat the facts again, the Board will merely adopt its recitation in its earlier opinion dated August 30, 2005 and filed under these same two docketed claims. Highly summarized, claimant alleges a box fell on him on December 24, 2003 and that after that date, he has continued to suffer a variety of physical complaints to his neck. That event forms the basis of Docket No. 1,022,407. Claimant also filed a second claim, Docket No. 1,021,750 alleging a series of accidents "each and every working day" to a variety of body parts. These two claims have been consolidated.

At all times pertinent to both claims involved this litigation, respondent has denied the underlying compensability issues, particularly the existence of a work-related injury. Respondent specifically denies claimant sustained an accidental injury arising out of or in the course of his employment with respondent on December 24, 2003, or on any dates since. In support of its argument, respondent maintains that claimant's testimony relating to his alleged accident(s), the witness to that accident, his subsequent medical treatment, and his outside activities was, based upon the record, blatantly untrue. Therefore, his lack of credibility compels a finding that he has failed to meet his burden of establishing a compensable injury in either docketed case.

This defense has been repeatedly asserted and in every instance, claimant has prevailed on this issue before the ALJ, albeit without much explanation. In the Board's most recent decision, the entire record was reviewed and the Board Member assigned to the case concluded "[b]ased upon this record, the Board finds that claimant has proven by a preponderance of the credible evidence that he has suffered injury, including injury to his neck, upper back and upper extremities, during his employment with respondent, with the injury date occurring through a series of accidents over a substantial period of time through May 4, 2005."<sup>3</sup>

In the most recent preliminary hearing, which has given rise to the instant appeal, claimant sought reinstatement of his TTD benefits alleging respondent wrongfully and

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<sup>2</sup> Claimant also has another docketed claim, Docket No. 1,022,408. That claim involves another body part and is not part of this appeal nor was it an issue at the October 11, 2005 preliminary hearing.

<sup>3</sup> Board Order, No. 1,021,750 & 1,022,407, 2005 WL 2181262 (Kan. WCAB Aug. 30, 2005).

unilaterally cut off his benefits. According to the record, claimant had an appointment with the authorized treating physician on August 25, 2005. And after appearing for his appointment, claimant was advised Dr. Pollock would be delayed due to surgery. Claimant determined that he felt poorly and wished not to wait on the doctor, and so the appointment was rescheduled for a time two weeks in the future.

It is undisputed that TTD benefits ceased as of August 25, 2005. Medical treatment has since been continued by agreement. But the weekly benefits have not been reinstated, in spite of Dr. Pollock's subsequent release of claimant to modified duty and the uncontroverted testimony from claimant that such duty does not exist and has not been offered despite his request.

At the preliminary hearing, testimony was brief as claimant had previously testified. He requested the TTD be reinstated. While respondent agreed to provide further medical treatment with Dr. Moufarrij, respondent adamantly denied claimant suffered any compensable injury at any time while in it's employ. To support this contention, respondent offered the testimony of Nathan Gaulin, the individual claimant identified as the supervisor who witnessed his December 24, 2003 accident. Mr. Gaulin testified that he is the part-time operation manager and that he does not recall claimant reporting any injury to him, nor did he recall claimant having any box fall on him in December 2003.

After considering this evidence, the ALJ ordered respondent to begin paying claimant TTD benefits as of August 25, 2005 and continuing until he reached maximum medical improvement. Implicit in that finding is the conclusion that claimant established that it is more likely than not that he suffered an accidental injury arising out of and in the course of his employment.

The Board has considered the evidence and finds the ALJ's conclusion should not be disturbed. Obviously, claimant's credibility has been challenged, and at the conclusion of this case those challenges may well work to respondent's advantage. The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In granting claimant's request, the ALJ apparently believed his testimony over the respondent's. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. It is troublesome that claimant made no complaints of neck problems until well after his December 24, 2003 accident and only after seeing Dr. Murati for several visits. It is also troubling that Dr. Pollock and his staff witnessed inconsistent effort and physical complaints. But as of this juncture, the Board finds the ALJ's preliminary hearing Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon full hearing on the claim.<sup>4</sup>

The parties and the ALJ are encouraged to conscientiously endeavor to make it clear, on the record and within the preliminary hearing order, precisely which claim is the focus of the hearing. These claims, along with that encompassed by Docket No. 1,022,408 have been routinely confused, blurred and/or omitted and when they present to the Board for an appeal, it is exceptionally difficult to determine the appropriate issues to consider.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated January 4, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2006.

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BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant  
Robert J. Wonnell, Attorney for Respondent and its Insurance Carriers  
Thomas Klein, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>4</sup> K.S.A. 44-534a(a)(2).